No. 02-693

IN THE

Supreme Court of the United States

JOHN M. LAMIE,

Petitioner,

v.

UNITED STATES TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* G. ERIC BRUNSTAD, JR. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS*

Amicus curiae G. Eric Brunstad, Jr. respectfully submits this brief in support of the Petition for a Writ of Certiorari. Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.[1]

The undersigned *amicus* is a Visiting Lecturer of Law at the Yale Law School, where he teaches courses on bankruptcy law, business reorganizations, and secured transactions. He has taught at Yale since 1992, and also has taught at the Harvard Law School.

In addition to teaching, the undersigned is the current Vice-Chair of the ABA Business Bankruptcy Committee. He is also a partner with the law firm of Bingham McCutchen LLP, practicing in the area of bankruptcy law and bankruptcy appeals. He is a contributing author to the Collier treatise on bankruptcy law and is responsible for multiple chapters of the treatise. He has argued before the Court, and has participated in several other bankruptcy cases in the Court.

The undersigned has studied and published articles on a variety of bankruptcy topics and is interested in the administration of bankruptcy law. The basic perspective of the undersigned is that it is vital to the equitable and efficient administration of bankruptcy law that the Court resolve the dispute in the lower courts concerning the proper interpretation of 11 U.S.C. § 330(a) and to construe the statute

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1. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity, other than *amicus curiae*, made a monetary contribution to the preparation or submission of this brief. The consents of the parties are being sent under separate cover.

in a manner that recognizes the critical importance of debtors' counsel in Chapter 7 and Chapter 11 bankruptcy proceedings. Consistent with Supreme Court Rule 37.1, the purpose of this brief is to bring to the Court's attention issues that other parties do not address.

STATEMENT

Petitioner John M. Lamie served as the attorney for the bankrupt debtor in this matter. Although the debtor's bankruptcy case began as a reorganization proceeding under Chapter 11 of the Bankruptcy Code, the matter was eventually converted to a liquidation proceeding under Chapter 7. Petitioner received compensation for his services rendered during the Chapter 11 phase, but was denied compensation for his services performed after the conversion to Chapter 7. The Fourth Circuit justified this result on its belief that, following its amendment in 1994, section 330(a) of the Bankruptcy Code no longer authorizes compensation for debtor's counsel in Chapter 7 proceedings.

In so holding, the Fourth Circuit followed the decisions of the Fifth and Eleventh Circuits. *See Ingelsby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Prod. Inc.)*, 197 F.3d 1354, 1355-57 (11th Cir.1999); *Andrews & Kurth L.L.P. v. Family Snacks, Inc. (In re Pro Snax Distribs., Inc.)*, 157 F.3d 414, 424-26 (5th Cir. 1998).[2]

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2. *See also In re Ramey*, 266 B.R. 857 (Bankr. S.D. Iowa 2001); *In re Skinner*, 240 B.R. 225 (Bankr. W.D. Va. 1999); *In re Keller Fin. Servs., Inc.*, 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999); *In re Johnson*, 234 B.R. 671 (Bankr. S.D. Tex. 1999); *In re Thomas*, 195 B.R. 18 (Bankr. W.D.N.Y. 1996); *In re Fassinger*, 191 B.R. 864, 865 (Cont'd)

The decision below, however, conflicts squarely with the holdings of the Third and Ninth Circuits, *see In re Top Grade Sausage, Inc.*, 227 F.3d 123, 127-30 (3d Cir. 2000); *United States Trustee v. Garvey, Schubert & Barer (In re Century Cleaning Servs., Inc.)*, 195 F.3d 1053, 1057-61 (9th Cir. 1999), with which the Second Circuit is "inclined to agree," *see In re Ames Dep't Stores*, 76 F.3d 66, 71-72 (2d Cir. 1996).[3]

SUMMARY OF ARGUMENT

The Fourth Circuit's ruling in this case deepens an acknowledged conflict among the Courts of Appeals and imperils the orderly administration of the Nation's bankruptcy laws. Like most other court proceedings, the successful administration of bankruptcy cases depends in large measure on the participation of skilled counsel to represent the parties involved, including the debtor. For well over a century, bankruptcy law has provided for the payment of the fees of debtor's counsel out of the assets of the debtor's bankruptcy estate because there is generally no other available source for the payment of these fees.

(Cont'd)
(Bankr. D. Or. 1996); *In re Friedland*, 182 B.R. 576, 578-79 (Bankr. D. Colo. 1995); *In re Kinnemore*, 181 B.R. 520, 521 (Bankr. D. Idaho 1995).

3. *See also United States Trustee v. Eggleston Works Loudspeaker Co. (In re Eggleston Works Loudspeaker Co.)*, 253 B.R. 519, 524 (BAP 6th Cir. 2000); *In re Taylor*, 250 B.R. 869, 870-71 (E.D. Va. 2000); *In re Brierwood Manor, Inc.*, 239 B.R. 709 (Bankr. D.N.J. 1999); *In re Bottone*, 226 B.R. 290, 297 (Bankr. D. Mass. 1998); *In re Miller*, 211 B.R. 399, 400-02 (Bankr. D. Kan. 1997); *In re Stroudsburg Dyeing & Finishing Co.*, 209 B.R. 648, 650 (Bankr. M.D. Pa. 1997); *In re Melp Ltd.*, 179 B.R. 636, 639 (E.D. Mo. 1995).

It cannot reasonably be expected that counsel will accept debtor representations in the Fourth, Fifth, and Eleventh Circuits, where their ability to be paid stands in doubt. Debtors in the Second, Third, and Ninth Circuits, however, suffer from no such impediment. For many insolvent debtors, the Bankruptcy Code's liberal venue provisions offer a choice of where to commence a Chapter 11 or Chapter 7 case. *See* 28 U.S.C. § 1408. Understandably, debtors with a choice will flock to the jurisdictions where their counsel can be paid. The split among the circuits thus promotes the unseemly spectacle of debtor forum shopping for fee-favorable venues. This unfortunate state of affairs should be corrected. Nothing in the Bankruptcy Code directs the categorical denial of compensation to debtor's counsel in Chapter 7 cases. On the contrary, the Fourth Circuit's interpretation of section 330(a) renders the statute inconsistent with other provisions of the Code that expressly provide for the payment of the debtor's attorney.

Moreover, the decision below is fundamentally inconsistent with the Code's purpose and policy. When Congress enacted the Code in 1978, it specifically sought, among other things, to promote the goal of "open access," making bankruptcy relief — including relief under Chapter 7 — widely available. The Fourth's Circuit's decision clearly conflicts with this policy, as denying compensation to the debtor's attorney can only have the effect of restricting access to otherwise-available relief.

One would expect that, if Congress had truly intended to overturn the longstanding practice of compensating debtor's counsel out of the assets of the debtor's estate, and likewise undermine its own policies in enacting the Code, some discussion of this intention would appear in the

legislative record. No such discussion, however, appears in any of the legislative materials. The Fourth Circuit based its decision to deny Petitioner compensation for his Chapter 7 services on the deletion in 1994 of certain language in section 330(a), which omission appears to be nothing more than an inadvertent scrivener's error. For these reasons, the Court should grant a writ of certiorari to review the decision of the Fourth Circuit in this case.

ARGUMENT

A. Certiorari Is Warranted Because The Decision Below Widens The Conflict Among The Courts Of Appeals Concerning The Proper Interpretation Of Section 330(a) And Contravenes The Text, History, And Policy Of The Bankruptcy Code.

When a debtor files for relief under Chapters 7 or 11 of the Bankruptcy Code, section 541 provides for the automatic creation of a bankruptcy estate consisting of all of the debtor's assets, wherever located and by whomever held. *See* 11 U.S.C. § 541. At the same time, the Bankruptcy Code imposes upon the debtor numerous duties and obligations, including the preparation of schedules; attendance at examinations and meetings; and participation in potentially protracted court hearings. *See, e.g.*, 11 U.S.C. §§ 343, 521. In Chapter 11 cases, the debtor bears additional responsibilities. *See, e.g.*, 11 U.S.C. § 1107. Quite clearly, the debtor will often require the assistance of counsel in order to participate in the process and for the system to work properly. Yet, by operation of section 541, the Bankruptcy Code effectively strips the debtor of ownership of the very assets that might be used to pay for this representation and vests these assets in the bankruptcy estate.

Not surprisingly, when Congress enacted the Bankruptcy Code in 1978, it continued the practice under the former Bankruptcy Act of 1898 of providing for the payment of the fees of debtor's counsel out of the assets of the estate. As originally enacted, section 330(a) expressly authorized the bankruptcy court to award reasonable compensation "to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, *or to the debtor's attorney*. . . ." 11 U.S.C. § 330(a) (1994) (emphasis supplied).

The enactment of section 330 in 1978 reflected an intentional liberalization of the award of attorneys' fees in bankruptcy cases in favor of attracting skilled representation to enhance the administration of bankruptcy proceedings. *See* Collier on Bankruptcy ("*Collier*"), ¶ 330.LH[4] (15th ed. rev. 2001). Under the former Bankruptcy Act, compensation to debtors' attorneys was superintended under a standard of "strictest economy" to conserve the bankruptcy estate and maximize the return to creditors. *Id.*, ¶ 330.LH[3]; *see In re UNR Indus., Inc.*, 986 F.2d 207, 208 (7th Cir. 1993). In enacting section 330, Congress abandoned this approach, making it plain that "[n]otions of economy of the estate in fixing fees are outdated and have no place in the bankruptcy code." *Collier*, ¶ 330.LH[4] & nn.5, 6 (citing legislative history and cases). Section 330 was intended to ensure that "[a]ttorneys and other professionals serving in a bankruptcy case are . . . compensated at the same rate that would be used to compensate them for performing comparable services in nonbankruptcy cases." *Collier*, ¶ 330.LH[4]. As explained by one court, section 330(a), as originally enacted, "was designed to ensure that bankruptcy counsel would command fees comparable to non-bankruptcy counsel, and thus that competent professionals would be attracted to the

bankruptcy field." *In re Pontiac Hotel Assocs.*, 92 B.R. 715, 716 (E.D. Mich. 1988) (citing H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329-30 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787). *See In re UNR Indus.*, 986 F.2d at 209 (in enacting section 330, "Congress expressed its intent that compensation in bankruptcy matters be commensurate with the fees awarded for comparable services in non-bankruptcy cases") (citing 11 U.S.C. § 330; H.R. Rep. No. 595, 95th Cong., 2d Sess. 329-30, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6286).

This intent plainly mirrors a "principal goal" of the Bankruptcy Code to provide "open access" to bankruptcy relief. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, Part II, 93rd Cong., 1st Sess. 75, 79 (1973); H.R. Rep. No. 595, 95th Cong., 1st Sess. 220 (1977). The rationale behind this policy is to offer access to bankruptcy relief that is as open as "access to the credit economy." *Id.* at 75. Obviously, denying compensation to debtors' attorneys would contravene this policy by reducing the availability of skilled counsel to guide the debtor through the complexities of the bankruptcy process.

The Fourth Circuit premised its conclusion in the decision below – namely that section 330(a) no longer authorizes an award of compensation for debtor's counsel in Chapter 7 cases — on the deletion in 1994 of the phrase "*or to the debtor's attorney*" at the end of the first of two lists of persons authorized to receive compensation contained in the section. The available evidence demonstrates, however, that this deletion was merely a scrivener's error, and that Congress harbored no intent to eliminate compensation for debtor's counsel in Chapter 7 cases.

As this Court has noted, Congress adopted the original Bankruptcy Code in 1978 after ten years of study. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989). By design, the Code was intended to function as a coherent regulatory scheme. Recognizing this, the Court has directed that its interpretation is properly a "holistic endeavor." *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Significantly, like the original text of section 330(a), other provisions of the Code still reference and provide for the payment of debtor's counsel in bankruptcy proceedings. These provisions include section 331, which specifically allows payment of interim compensation to debtor's counsel during the course of a bankruptcy case. *See* 11 U.S.C. § 331. In amending the Code in 1994, Congress left this and similar provisions untouched. If Congress had truly intended to revise the Code's compensation provisions to foreclose debtors' attorneys from receiving payment for their services in Chapter 7 cases, one would expect a more comprehensive alteration of the entire compensation scheme, and not one that leaves unaltered the authorization for interim compensation.

Moreover, the 1994 amendments introduced numerous inconsistencies and grammatical errors to the text of section 330, further undermining any inference of a deliberate intention to eliminate compensation for debtor's counsel. For example, following its amendment in 1994, the section now contains two subsections denominated as 330(a)(3)(A). In addition, although the first part of section 330(a)(1) currently omits reference to "the debtor's attorney," another part of the same subsection retains the reference to the "attorney" that formerly referred clearly and exclusively to

the now deleted "debtor's attorney" in the original provision. *See* 11 U.S.C. § 330(a)(1)(A). Indeed, unless the retained reference to "attorney" in section 330(a)(1)(A) refers to the omitted "debtor's attorney" in former section 330(a)(1), it is meaningless.

Similarly, section 330(a) expressly authorizes compensation for debtors' attorneys in proceedings under Chapters 12 and 13. *See* 11 U.S.C. § 330(a)(4)(B). There is no discernible reason, however, why Congress would permit compensation to debtors' attorneys in proceedings under Chapters 12 and 13, yet deny it in Chapter 7 cases. Moreover, as amended, section 330(a)(1) is missing the conjunction "or" in the list of persons entitled to receive compensation, suggesting further that the deletion of the phrase "or the debtor's attorney" was inadvertent. *See* 11 U.S.C. § 330(a)(1) (stating that "the court may award to a trustee, an examiner, [*sic*] a professional person"). *See generally* Joseph G. Minias, *Text and Context: Discerning the Basis for Debtor's Attorneys' Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 Bankr. Dev. J. 201, 211-213 & nn.80-108 (2001) (summarizing errors and inconsistencies noted by courts; particularly the Third and Ninth Circuits in the *In re Top Grade Sausage* and *In re Century Cleaning* cases).

These and other difficulties with section 330(a)(1) demonstrate uncertainty as to its construction. To resolve its several ambiguities, the provision should be interpreted in accordance with its history, policy, and purpose, as well as consistently with other provisions of the Code. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (citations and internal quotation marks

omitted); *Duparquet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 218 (1936) ("To fix the meaning of these provisions [of the Bankruptcy Act] there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."). This is especially so given the magnitude of the change resulting from the Fourth Circuit's interpretation.

As this Court has stated, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (citing *Emil v. Hanley*, 318 U.S. 515, 521 (1943)). As the Court has further explained, it has been especially reluctant to interpret the Bankruptcy Code to effect sweeping change that has not been "the subject of at least some discussion in the legislative history." *Dewsnup*, 502 U.S. at 419 (citing *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990); *Ron Pair Enters.*, 489 U.S. at 244-245; *United Savings Ass'n of Texas*, 484 U.S. at 380); *see Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 495 (1986).

"Of course, where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup*, 502 U.S. at 419-20. But in this case, the ambiguities, inconsistencies, and incoherence of the statutory text, coupled with the absence of any meaningful discussion of the relevant deletion in the legislative record, caution against abandoning the section's historic interpretation. *See Collier*, ¶ 330.LH[5] ("[S]ection 330(a)(1) of the Code deletes the reference to 'the debtor's attorney' as a party who may be allowed compensation. Clearly this result was unintended. . . . [It] would represent a fundamental change in the law. . . . Because the change is inconsistent with current case law and the

legislative history of section 330 does not support such a drastic change, courts should construe the deletion as unintended.")

B. Certiorari Is Warranted Because Resolution Of The Interpretive Dispute In the Lower Courts Is Vital To The Administration Of The Bankruptcy Code.

Certiorari is further warranted because of the significance of the issue in the larger administration of bankruptcy proceedings. The controversy in this case affects potentially every Chapter 7 case, and every Chapter 11 proceeding that is converted to a Chapter 7 case, as happened here. It has been reported that, in the year ending June 30, 2002, 1,053,230 Chapter 7 cases and 11,401 Chapter 11 cases were filed nationwide. *See* U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12 Month Period Ending June 30, 2002, Table F-2 (Office of Human Res. & Statistics June 2002), at http://www.uscourts.gov/judiciary2002/contents.html. As a matter of law, equity, and efficiency, the debtors who file these cases need and are entitled to representation.

The current split of authority among the Courts of Appeals over the proper interpretation of section 330 unavoidably distorts the administration of bankruptcy proceedings. In general, under 28 U.S.C. § 1408, a debtor may commence a bankruptcy case in any venue in which the debtor has a domicile, residence, principal place of business, or property. Given the ease with which a debtor may qualify for venue in any particular district under this provision, the current conflict among the circuits on the issue of

compensation for the debtor's attorney creates a powerful incentive for debtors to select venues where their counsel may be paid. The incentive for forum shopping is unseemly, and should be corrected.

Moreover, the Fourth Circuit's interpretation of section 330(a) jeopardizes the equitable and efficient administration of bankruptcy cases. The prospect of receiving no compensation "may have the effect of denial of counsel, or at the very least, lead to debtors representing themselves. This possibility may lead to increased errors and time spent to correct those errors, thereby further extending the time necessary to adjudicate all parts of the case." Minias, 18 BANK. DEV. J. at 225-26. Moreover, the attorneys who do not leave the bankruptcy arena entirely may find themselves often "working for free," either because the bankruptcy court refuses to allow them to withdraw or because "state law ethical obligations may require an attorney to continue to perform as counsel, regardless of the potential prohibition of payment." Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee Is Appointed: When Should Debtor's Counsel Stop Working*, 18 Am. Bankr. Inst. J. 20, 21 (June 1999).

If Congress had intended such a drastic departure from existing law and practice, surely it would have discussed it somewhere. Because there is no indication that Congress intended this result, the current conflict among the Courts of Appeals should be resolved consistent with the efficient and fair administration of bankruptcy relief.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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